Supreme Court, U.S.
F I L E D
MAR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1401

IN THE
Supreme Court of the United States
October Term, 1989

EXXON CORPORATION,
Petitioner,
vs.
WYOMING STATE BOARD OF EQUALIZATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March, 1990

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QUESTION PRESENTED

IN VIEW OF THE UNIQUE AND LIMITED APPLICATION OF WYOMING USE TAX TO THE BONA FIDE FIRST USE OF TANGIBLE PERSONAL PROPERTY AND THE AVAILABILITY OF AN OFFSETTING CREDIT FOR SALES TAXES PAID IN OTHER STATES, DOES THE WYOMING USE TAX VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

Page No.

Table of Cases and Other Authorities iii

Concise Statement of the Case 1

A. Proceedings Below 1

B. Evidence Presented Below 2

C. Decision Below 4

Summary of the Argument 6

Argument

REASONS CERTIORARI SHOULD BE DENIED .. 7

A. GIVEN THE LIMITED NATURE OF THE WYOMING USE TAX, CERTIORARI SHOULD BE DENIED BECAUSE THE TAX HAS BEEN TAILORED IN ACCORDANCE WITH THE APPLICABLE DECISIONS OF THIS COURT 7

B. THE "FIRST USE" REQUIREMENT SATISFIES THE APPORTIONMENT TESTS ESTABLISHED BY THIS COURT 10

C. THE WYOMING USE TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE 13

Conclusion 16

TABLE OF CASES AND OTHER AUTHORITIES

Cases: Page No.

Colonial Pipeline Co. v. Traigle,
421 U.S. 100, 107-108 (1975) 7

Commonwealth Edison Co. V. Montana,
453 U.S. 609, 615 (1981) 10

Coverdale v. Arkansas - Louisiana P.L. Co.,
303 U.S. 604, 612-613 (1938) 9,12

D.H. Holmes Co. Ltd. v. McNamara,
485 U.S. 24, (1988) 8,9

Exxon Corporation v. Wyoming State Board of Equalization,
783 P.2d 685 (Wyo. 1989) 1

Goldberg v. Sweet,
109 S.Ct. 582 (1989) 8,10

Halliburton Oil Well Co. v. Reily,
373 U.S. 64, 69 (1963) 13,15

Henneford v. Silas Mason Co.,
300 U.S. 577 (1937) 8

Hope Natural Gas Co. v. Hall,
274 U.S. 284 (1927) 0

Maryland v. Louisiana,
451 U.S. 725, 756 (1981) 15

Memphis Natural Gas Co. v. Stone,
335 U.S. 80, 93 (1948) 7,9

Morrison-Knudson Co., Inc. v. State Board of Equalization,
58 Wyo. 500, 135 P.2d 927, 932 (1943) 15

Oliver Iron Min. Co. v. Lord,
262 U.S. 172 (1923) 9

Portland Cement Co. v. Minnesota,
358 U.S. 450 (1959) 11

Southern Pacific v. Gallagher,
306 U.S. 167 (1939) 8

Standard Pressed Steel Co. v. Washington Revenue Dept.,
419 U.S. 560 (1975) 13

Tyler Pipe Industries, Inc. v. Department of Revenue,
483 U.S. 232 (1987) 14

Utah Power & Light Co. v. Pfost,
286 U.S. 165 (1932) 9

Washington Revenue Dept. v. Stevedoring,
435 U.S. 734, (1978) 9

Western Live Stock v. Bureau of Revenue,
303 U.S. 250 (1938) 9

Williams v. Vermont,
472 U.S. 14, 21-22 (1985) 6

Statute:

W.S. 39-6-505(a)(i) 14

Other Authorities:

Rules and Regulations, Wyoming State Tax Commission, Department of Revenue and Taxation
Chapter IV, Section 3 3,15
Chapter IV, Section 7(b) 3
Chapter IV, Section 8 4

Rules of the Supreme Court of the United States,
Rule 17.1 7

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CONCISE STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

In *Exxon Corporation v. Wyoming State Board of Equalization*, 783 P.2d 685 (Wyo. 1989) the Wyoming Supreme Court affirmed the administrative decision of the Wyoming State Board of Equalization. Petitioner had requested an offsetting credit for use taxes voluntarily paid to Colorado against a deficiency assessment resulting from an audit of Petitioner's records for the period March 1, 1983, through February 28, 1986. The audit disclosed that Petitioner had failed to pay Wyoming use taxes on pipe purchased from Marubeni American Corporation, a Texas vendor, and used in the construction of the Shute Creek to Rock Springs carbon dioxide pipeline. It is the denial of the request for an offsetting credit against the use tax assessment from which Petitioner appealed.

B. EVIDENCE PRESENTED BELOW

Respondent believes that Petitioner's Statement of the Case is not accurate, nor complete. Respondent submits the following concise statement of the undisputed facts presented to the court below.

Between February and May of 1985, Petitioner purchased 258,000 feet of 24-inch pipe from Marubeni American Corporation under the terms, "F.O.B. Railcar at Encoat Yard in Fort Collins, Colorado." The pipe was shipped from Kasaoka, Japan, via Portland, Oregon, to Fort Collins, Colorado. In Fort Collins, Energy Coating Company (Encoat) inspected, sand blasted, and coated the pipe with a thin-film epoxy. This process took approximately 90 to 120 days. Thereafter the pipe was shipped to Wyoming by a separate contractor, where the pipe was used to construct an intrastate pipeline for transportation of carbon dioxide gas. The total purchase price of the pipe paid by Exxon was $13,179,894.83

Before the Wyoming Supreme Court, Petitioner for the first time argued that Encoat was Petitioner's agent. There are no facts in the record to support any kind of agency relationship between Encoat and Petitioner. Petitioner did not argue or suggest during the administrative proceedings that Encoat was its agent.

The pipe was shipped to Encoat, an independent contractor, who took possession of the pipe for purposes of inspecting, sand blasting, and coating. Petitioner had a separate purchase order with Encoat. The total order value was $709,500. Upon completion of this process, the pipe was given to a separate contractor for transportation to Wyoming.

After an internal audit, Exxon voluntarily filed an amended tax return with the State of Colorado and paid a Colorado use tax of three percent (3%) of the purchase price of the pipe. Petitioner characterized the tax paid as Colorado use tax. The Board determined and the Wyoming Supreme Court accepted the finding that the tax paid was a Colorado use tax. The validity of such tax, either statutorily or constitutionally, has never been judicially determined.

STATUTORY PROVISIONS INVOLVED

Along with the statutory provisions cited by Petitioner at pages 2 and 3 of its petition, the following administrative regulations are involved in this case.

The Rules and Regulations of the Wyoming State Tax Commission—Department of Revenue and Taxation, Chapter IV, Section 3:

> *Transactions Subject to Tax*
> The purchase or lease of all tangible personal property outside this state for first use, storage or consumption within this state, is subject to use tax, providing the same transaction would be subject to sales tax if the transaction had occurred wholly within the State of Wyoming.

Chapter IV, Section 7(b):

> Use tax does not apply to tangible personal property purchased for use in other states, shipped to this state and remaining here temporarily.

Chapter IV, Section 8:

> *Place of First Use.*
> When tangible personal property is purchased in another state and is brought into Wyoming for use, the burden is upon the purchaser to show that there was a bona fide first use of the property outside the State of Wyoming.

C. DECISION BELOW

In its opinion, the Wyoming Supreme Court recognized "the self-imposed limitation" of Chapter IV, Section 3 noted above. The court explained that use tax is applied "only if the use of the tangible personal property in Wyoming constitutes its 'first use.'" If the "first use" occurs in another state, Wyoming would not impose a use tax on such property. 783 P.2d at 688.

The court specifically disagreed with Petitioner's characterization of activities relating to the coating of the pipe as an exercise of a "right or power over tangible personal property incident to ownership."[1] The court explained:

> The activities in Colorado were merely processes necessary to prepare the pipe for the use intended, its installation into and ultimate use as part of the Shute Creek CO2 pipeline in Wyoming. The Board properly concluded that it is a use of the property in the manner for which it *was designed, constructed or intended that constitutes a 'first*

[1] In essence, the Court, without specifically stating the conclusion, concluded that the Colorado use tax was not valid.

> use' as that phrase was intended by the Wyoming Tax Commission in Chap. IV, § 3. When making the determination as to whether the first use of the property occurred in Wyoming or another state, the Tax Commission looks to the nature of the property, its intended use, and whether the property was actually used in that manner in the other state. We hold that the Board *properly found that the first use in this case was the incorporation of the pipe into the Shute Creek CO2 pipeline.*
> (Emphasis added.)

783 P.2d at 688-689.

The court also recognized that while Wyoming routinely grants an offsetting credit for sales taxes legally imposed by another state, "[T]here is no statute, regulation or applicable principle of law which requires the Board to grant a credit for a use tax paid in another state." 783 P.2d at 689. The court rejected Petitioner's argument that the Wyoming use tax violated the Commerce Clause of the United State Constitution, noting:

> The taxing scheme employed by Wyoming fulfills each prong of the Complete Auto test: (1) the activity being taxed has a substantial nexus to the taxing state; the pipe was delivered in Wyoming and installed in a pipeline operating solely in this state; (2) it is fairly apportioned, since it taxes only the use of the pipe in Wyoming; (3) it does not discriminate against interstate commerce because the tax is designed to compensate the State for revenue lost on out-of-state purchases of goods used in this state and is equal

> to the sales tax on the same goods had they been purchased in Wyoming, W.S. 39-6-404 (a); and (4) it is fairly related to state-provided services that facilitate Exxon's use of the pipe in Wyoming, including fire and police protection for the pipeline facilities and state maintenance of roads to the area. See, *D. H. Holmes Co. Ltd. v. McNamara*, 485 U.S. 24, , 108 S.Ct. 1619, 1624, 100 L.Ed.2d 21 (1988)....

783 P.2d at 689-690.

SUMMARY OF THE ARGUMENT

Under the unique circumstances of this case, Wyoming has specifically tailored the application of use taxes to "first use." The scope of the Wyoming use tax is limited and does not warrant review by this Court. The application of this "first use" principle prevents multiple taxation and does not discriminate against interstate commerce. There is no compelling reason why this Court should review this narrow issue on certiorari. Given the restricted application of the tax, the decision of the Wyoming Supreme Court is in complete accord with the prior decisions of this Court and such decisions are controlling.

This Court has expressly reserved the question whether a state must credit a sales tax paid to another state against its own use tax. *Williams v. Vermont*, 472 U.S. 14, 21-22 (1985). In this case, because Wyoming does credit sales taxes paid in other states against its use tax and limits application of use tax on the basis of "first use," the reserved question would not be addressed in this case.

ARGUMENT - REASONS CERTIORARI SHOULD BE DENIED

Under Rule 17.1 of the Rules of the Supreme Court of the United States, there are simply no "special and important reasons" for the Court to exercise its discretion and review this matter on certiorari. The parameters of the Wyoming use tax have been established by the Wyoming Supreme Court. The decision of the court below is accurate and correct.

A. GIVEN THE LIMITED NATURE OF THE WYOMING USE TAX, CERTIORARI SHOULD BE DENIED BECAUSE THE TAX HAS BEEN TAILORED IN ACCORDANCE WITH THE APPLICABLE DECISIONS OF THIS COURT.

This Court must accept the state court's interpretation of the Wyoming use tax. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 93 (1948). The state may determine for itself the operating incidence of its tax. *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 107-108 (1975) citing *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 392 (1952).

In this case, three important features of the Wyoming use tax should be recognized: (1) an offsetting credit is provided for sales taxes legally imposed by another state; (2) the tax is only imposed when the property is first used in Wyoming in the manner for which it was designed, constructed or intended; and (3) the use tax is not imposed upon property first used in another state in the manner for which it was designed, constructed or intended. Although an offsetting credit for use tax paid to another state is not provided, the Wyoming use tax would not be imposed if the first bona fide use of the property occurred in another state.

In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) this Court explained:

> We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it *mandatory* that there should be a like allowance for taxes paid to other states. A state, for many reasons, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. ... The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any semblance of inequality or prejudice. A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power. (Emphasis added.)

300 U.S. at 587.

Here, Wyoming has conceded the offsetting allowance for sales taxes paid to other states. See *D.H. Holmes Co. Ltd. v. McNamara*, 485 U.S. 24 (1988). Furthermore, the use tax has been tailored to comply with the Commerce Clause analysis established by this Court. See *Goldberg v. Sweet*, 109 S.Ct. 582 (1989).

Similarly, in *Southern Pacific v. Gallagher*, 306 U.S. 167 (1939) this Court upheld a California use tax which did not provide a credit against local tax of any such foreign levy. With regard to the lack of an offsetting credit, the Court explained:

> No such problem arises here by evidence, finding or assignment of error even though

> the California Act does not have this provision. It will be time enough to resolve that argument, 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination'....

306 U.S. at 172.

Here, Petitioner was not forced to pay the Colorado use tax; rather Petitioner volunteered 3% of the purchase price of the pipe for incidental and temporary activities merely preparatory to the bona fide first use of the pipe in Wyoming.

The limited application of the Wyoming use tax to the bona fide first use of the pipe is simple recognition that use taxes should be tailored to the activity subjected to the tax. The actual first use of the pipe in Wyoming is not duplicated in any other state.[2] Limited in such a way, the incident of the tax "does not lend itself to repeated exactions in other states." *Memphis Natural Gas Co. v. Stone*, 335 U.S. at 87.

[2] This Court upheld the tax in *Memphis Natural Gas Co.*, 335 U.S. 80 (1948), noting that it could not be duplicated in other states and there was no possibility of multiple taxation. 335 U.S. at 88. This Court has similarly upheld excise taxes on: (1) the generation of electrical power in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932); (2) the mining of minerals in *Oliver Iron Min. Co. v. Lord*, 262 U.S. 172 (1923); (3) the production of natural gas in *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927); (4) the power used to operate compressor stations along an interstate pipeline in *Coverdale v. Arkansas - Louisiana P.L. Co.*, 303 U.S. 604 (1938); (5) the sale of advertising space by one engaged in the business of publishing newspapers or magazines on gross receipts in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); (6) the business of loading and unloading cargo from ships in *Washington Revenue Dept. v. Stevedoring Assn.*, 435 U.S. 734, 98 S.Ct. 1388 (1978); and (7) the use of catalogs in *D.H. Holmes Co. LTD. v. McNamara*, 485 U.S. 24, 108 S.Ct. 1619 (1988).

Although this Court has rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a local or intrastate activity, the Court has also recognized the limited problems associated with state taxes applied against intrastate activities. In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981), this Court noted with regard to a Commerce Clause challenge to a state severance tax:

> Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, 'the severance can occur in no other state' and 'no other state can tax the severance'....

453 U.S. at 617.

Although tangible personal property could be used in several different states, when the tax is specifically limited to the first bona fide use of such property, the tax is imposed only once by one state. In practical operation the tax is apportioned in accordance with the true incidence of the tax. Duplication of the tax is rendered impossible.

B. THE "FIRST USE" REQUIREMENT SATISFIES THE APPORTIONMENT TESTS ESTABLISHED BY THIS COURT.

The Wyoming use tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's system of taxation. Maryland v. Louisiana, 451 U.S. 725, 756 (1981).

In *Goldberg v. Sweet*, 109 S.Ct. 582 (1989) this Court explained the "external consistency" and "internal consistency" tests of the apportionment requirement:

> In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction. See, e.g., Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169 (1983). But 'we have long held that the Constitution imposes *no single apportionment formula on the States*,'... and therefore have declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation'.... Instead, we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent....
>
> To be internally consistent, a tax must be structured *so that if every state were to impose an identical tax, no multiple taxation would result*. 463 U.S., at 169. Thus, the internal consistency test focuses on the *text* of the challenged statute and *hypothesizes* a situation where other states have passed an identical statute. We conclude that the Tax Act is internally consistent, for if every state taxed only those interstate phone calls which are charged to an in state service address, only one state would tax each interstate telephone call. (Emphasis added.)

109 S.Ct. at 589.

If every state were to impose an identical "first use" tax, as described by the Wyoming Supreme Court, there logically could not exist any multiple taxation. *Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). If each state taxed only the "first use" of property, i.e., the first use of

the property for which it was designed, constructed or intended, only one state could impose such a tax. The use of the property, or in this case, the installation of the pipe into a pipeline located in that particular state, would be subject to one tax by one state. Although the length of the pipeline might generate the possibility of different states imposing different use taxes on uses within each state, that would not be multiple taxation. *Coverdale v. Arkansas-Louisiana P.L. Co.*, 303 U.S. 604, 612-613 (1938). So long as each state only imposed use tax on that portion of the pipe first used in the pipeline within that particular state, the use taxes would be properly apportioned among the various states.

In *Goldberg, supra*, this Court also explained the "external consistency test":

> The external consistency test asks whether the state has taxed only that portion of the revenues from the interstate activity *which reasonably reflects the in-state component of the activity being taxed. Container Corp., supra, at 169-170.* We thus examine the *in-state business activity* which *triggers* the taxable event and *the practical or economic effect of the tax on that interstate activity.* ... We believe that the Director has the better of this argument. The tax at issue has many of the characteristics of *a sales tax*. It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activities in several states, ... the Tax Act reasonably reflects the way that consumers purchase interstate telephone calls. (Emphasis added.)

109 S.Ct. at 589.

As previously noted, the pipe in this case was brought into Wyoming for the purpose of building a pipeline to transport Wyoming natural resources between Shute Creek and Rock Springs, Wyoming. The pipe was used in Wyoming for the purpose intended by the Petitioner at the time of purchase. Since the property was actually used in Wyoming, it is reasonable to expect that Wyoming should impose the use tax on such property. The practical effect of the tax occurs after the interstate transportation of the pipe. The economic effect of the use tax is identical to that of a sales tax; indeed, the purpose of the use tax is to create an economic effect identical to the Wyoming sales tax. The tax is apportioned exactly to the activities taxes, i.e., actual use in Wyoming. *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560 (1975).

It is doubtful that the Colorado use tax voluntarily paid by the Petitioner could withstand the apportionment test outlined above. As previously noted, the pipe was not used in Colordao, rather the pipe was coated by an independent contractor. Under any circumstances, the use tax voluntarily paid to Colorado was not restricted to the value of services performed in Colorado, but rather paid upon the purchase price of the pipe. Furthermore, multiple taxation would result if every state attempted to use the purchase price as the basis for a tax relating to activities that were merely incidental and preparatory to the ultimate use of such property.

C. THE WYOMING USE TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

This Court is "concerned with the actuality of operation" when determining whether the practical operation of a state tax will work discriminatorily against interstate commerce. *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 69 (1963). Equal treatment for in-state and out-of-state

taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state. *Id.*, 373 U.S. at 70.

By way of explanation, this Court in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987) explained the result in *Henneford, supra*:

> We upheld the tax because, in the context of the overall tax structure, the burden it placed on good purchases out-of-state was identical to that placed on an equivalent purchase within the state. The identical impact was no fortuity; it was guaranteed by the statutory exemption from the use tax for goods on which a sales tax has already been paid, regardless of whether the sales tax had been paid to Washington or to another state.

483 U.S. at 245.

Similarly, the Wyoming use tax provides a credit for sales taxes paid in another state. In addition, an exemption from use tax is recognized if a sales tax is paid to the State of Wyoming. W.S. 39-6-505(a)(i).

Furthermore, Wyoming use tax is only imposed upon the *first* actual use of property within Wyoming. The practical effect of this limited application of the use tax is to exempt property that is first used in another state in the manner in which it was intended. The Wyoming Supreme Court noted, "if the first use of the property occurs in another state, Wyoming's use tax is inapplicable." 783 P.2d at 688. Thus, the Wyoming use tax goes further than a mere credit; it actually exempts property first used in another state. Again, the tax is apportioned between Wyoming and its sister states on the basis of first actual use of the tangible personal property.

In actual operation, the Wyoming use tax equalizes the tax burden applied to both in-state and out-of-state taxpayers. No one who actually uses property in Wyoming after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a sales tax to Wyoming or any other state, or actually used the property in another state. Everyone who has actually used the property in another state or has paid a sales tax in Wyoming or another state, is to that extent exempted from the payment of another tax in Wyoming. "Equality is the theme that runs through all the sections of the statute." *Henneford, supra*, 300 U.S. at 583.

The complementary nature of the Wyoming use tax cannot be doubted. The rules and regulations cited above clearly indicate that the use tax is imposed on "first use" within Wyoming, "providing the same transaction would be subject to sales tax if the transaction had occurred wholly within the State of Wyoming." Chapter IV, § 3 Rules and Regulations of Wyoming Tax Commission.[3] The sales taxes and the use taxes are equivalent in amount. The Wyoming legislature intended this complementary effect, i.e., to put property purchased outside the state and brought into the state on an equal footing with property purchased within the state that is subject to the Wyoming sales tax. *Morrison-Knudson Co., Inc. v. State Board of Equalization*, 58 Wyo. 500, 135 P.2d 927, 932 (1943).

When considering whether a tax is discriminatory, this Court has maintained, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co. v. Reily, supra*, 373 U.S. at 70. In this case, had

[3] As noted in *Maryland v. Louisiana, supra*, 451 U.S. at 758, the "concept of a compensatory tax first requires identification of the burden for which the state is attempting to compensate." Such burden has been identified.

Petitioner purchased the pipe in the locality of ultimate use. Petitioner would have paid 4% of the purchase price for sales tax purposes. If the same pipe had been transported to Colorado for coating purposes and thereafter transported back to Wyoming for installation into the pipeline, the same sales tax would have been imposed. An equivalent amount of Wyoming use tax is imposed if the pipe is purchased out-of-state for first use in Wyoming. If a sales tax were paid to another state on such purchase, Wyoming would permit a credit against the use tax. The tax burden would be the same regardless of which tax were applicable. The tax is not discriminatory.

CONCLUSION

The Wyoming use tax does not discriminate against interstate commerce and is apportioned to activities occurring within the state and does not violate the Commerce Clause.

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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